IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 87-273

HARRY NORMAN BALL, TRUSTEE, PETITIONER

UNITED STATES OF AMERICA, PLAINTIFF

v.

PARAMOUNT PICTURES, INC., ET AL., DEFENDANTS

MOTION TO AFFIRM

Pursuant to Rule 12, paragraph 3, of the Revised Rules of the Supreme Court, appellee United States of America moves that the order of the district court from which the appeal has been taken be affirmed.

This is an appeal from an order of the United States District Court for the Southern District of New York denying the above petitioner (appellant in the Supreme Court) leave to intervene in a civil proceeding brought by the United States under Section 4 of the Act of July 2, 1890, known as the Sherman Act, against Paramount Pictures, Inc., and seven other leading distributors of motion-picture films and certain of their subsidiaries. The application for leave to intervene was made and denied under the following circumstances:

The principal proceeding was instituted by the United States in July 1938. Various violations

of the Sherman Act were charged and comprehensive relief was prayed. On November 20, 1940, a decree was entered by consent, establishing *inter alia* a trial period of three years for most of its provisions, against five of the defendant distributors—including Paramount Pictures, Inc.—and their defendant subsidiaries.

On August 7, 1944, the Government filed an application for modification of the consent decree. The answer of the consenting defendants denied any right to such relief and the case was set down for trial of all issues against all defendants. After the district court had entered a final judgment on December 31, 1946, all the defendants appealed from the judgment. The United States also appealed upon the ground that the relief granted by the judgment was inadequate.

On May 3, 1948, this Court affirmed the judgment below in part and reversed it in part, and remanded the cause to the district court for further proceedings in conformity with the Court's opinion. *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131. The Court upheld the district court's findings as to defendants' violation of the Sherman Act and, on the question of relief, it affirmed many of the provisions of the district court's judgment. Other provisions of the judgment, however, were set aside upon the ground that they failed to give adequate relief.

On March 3, 1949, a decree was entered by consent against Paramount Pictures, Inc., and Paramount Film Distributing Corporation, which will be collectively referred to as Paramount. The consent decree contains elaborate provisions designed to achieve divorcement of Paramount's exhibition business from its production and dis-

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tribution business. It provides for divestiture of a large number of Paramount's theatres and it imposes various injunctive prohibitions on Paramount and the business units into which it is to be split.

Petitioner-appellant is the owner of the Penn Theatre in Ambridge, Pennsylvania, which he purchased in 1943. At that time Pennware Theatre Corporation was the lessee thereof. Paramount Pictures, Inc. and an exhibitor Notopoulos, each owned 50 per cent of the stock of Pennware. Upon termination of the lease in 1944, Pennware vacated the Penn Theatre and thereafter constructed and operated the State Theatre, also located in Ambridge. The first run pictures formerly exhibited in the Penn Theatre, under the Pennware regime, were transferred to the State Theatre at the request of Pennware, and petitioner was unable to obtain any first run pictures from Paramount and other major film distributors. Petitioner successfully brought suit under the antitrust laws against Paramount, Notopoulos, Pennware and others and has recovered a judgment providing for an award of damages and injunctive relief. *Ball* v. *Paramount Pictures, Inc.*, 169 F. (2d) 317 (C. A. 3).

Petitioner-appellant, nevertheless, sought to intervene in the consent decree proceedings between the Government and Paramount in the court below. The claim of relief which petitioner apparently sought was to have included within the consent decree a provision closing the State Theatre in Ambridge. On the same day in which the consent decree was entered the district court denied petitioner-appellant's application for leave to intervene.

Jurisdiction of the appeal is invoked under Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U. S. C. 29, and under Title 28, United States Code, Section 2101(b).

Petitioner-appellant is plainly not entitled to intervene as of right under Rule 24(a) of the Rules of Civil Procedure. No statute of the United States gives it an unconditional right to intervene; it is not bound by the consent decree; nor will any property in which it has an interest be "adversely affected" by the consent decree. See *Allen Calculators, Inc.* v. *National Cash Register Co.*, 322 U. S. 137, 140-141. Furthermore, no provision of the consent decree gives petitioner-appellant a right of intervention. Cf., *Missouri-Kansas Pipe Line Co.* v. *United States*, 312 U. S. 502.

No showing has been made that the Government's representation of the general interests of independent exhibitors has been inadequate. The consent decree, by its terms, enjoins Paramount from continuing to own the State Theatre and requires that its existing ownership be terminated within three years from the date of entry of the consent judgment. The gravamen of petitioner-appellant's complaint is that the consent decree does not require the closing of the State Theatre, a theatre which, petitioner claims, is "an illegal fruit of the monopoly." But the proper place for determining whether such relief is appropriate is in the litigation now pending in the Third Circuit where this relief has been requested.[1] That petitioner has a right of action under the antitrust laws,

[1] After the district court had entered judgment following remand from the court of appeals, petitioner-appellant again appealed to that court upon the ground that the relief granted by the judgment is inadequate.

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"grants no privilege, much less an unconditional right, to intervene in suits under the Sherman Act brought by the United States." *Allen Calculators* case, at page 141.

It is equally clear that the action of the district court in denying permissive intervention was not an abuse of discretion constituting reversible error. Rule 24(b) provides that the court, in exercising its discretion in passing upon intervention shall consider whether intervention will "unduly delay or prejudice the adjudication of the rights of the original parties." The most important relief granted by the consent decree is the divorcement of Paramount's distribution business from its exhibition business. To have permitted exhibitors injured by Paramount to interject themselves into the proceedings for the purpose of acquiring relief specifically designed to protect their individual interests might have prevented this or any other decree by consent. As the district court observed in connection with the application for intervention: "There have been a great many representations that people might be affected, and they might be affected. We can't provide for all these outside litigations. There would never be any consent decree . . ." These considerations alone plainly bring the matter within the area of the court's discretion.

There is also no substance to petitioner's assertion that he was entitled to intervene to prove that the consent decree did not carry out the mandate of this Court. The mandate opened many broad avenues of relief, but it did not require that all should be pushed to their ultimate limits. The Government accepted the decree against Paramount in the belief that securing definitely the

relief provided by the decree would be of greater benefit to the industry as a whole than risking the uncertainties and delays incident to bringing every relief issue to trial. Acceptance of the decree represented an exercise of judgment such as is called for at almost every stage in the prosecution of a civil proceeding under the antitrust laws.

In considering whether the district court's order denying intervention constituted an abuse of discretion, the position respecting intervention taken by the Government, which bears direct responsibility for enforcement of the statute, is certainly a material consideration. In the *Allen Calculators* case denial of intervention was held not to be an abuse of discretion although the Government had supported intervention in the district court. *A fortiori,* there was no abuse of discretion under all the circumstances of the present case, including the fact that the Government opposed the application to intervene. It supported petitioner-appellant's right to be heard with respect to his claim that the consent decree might prejudice his position in the Third Circuit Litigation, but denied that any such prejudice could occur and opposed his application to become a party to this litigation.

For the foregoing reasons, it is evident that this appeal presents no substantial question. It is therefore respectfully submitted that the order of the district court denying intervention should be affirmed.

PHILIP B. PERLMAN,
Solicitor General.

APRIL 22, 1949.

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